U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

DATE: January 10, 2000

CASE NO: 2000-ERA-00001

In The Matter of

SYED M.A. HASAN
Complainant

v.

COMMONWEALTH EDISON COMPANY (ComEd) AND
THE ESTES GROUP, INC.
Respondents

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENTS'MOTIONS TO DISMISS AND CANCELLING FORMAL HEARING

This proceeding arises under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §§ 5851 and the regulations promulgated thereunder at 20 C.F.R. Part 24 which are employee protective provisions of ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, et seq. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission (NRC) who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

The Complainant has requested a hearing based upon the Secretary's findings that there is no merit to Complainant's complaints of discrimination against Respondents in violation of the employee protective provisions of the ERA.

On November 19, 1999, a Notice of Hearing and Pre-Hearing Order issued in this matter scheduling a formal hearing on January 19, 2000. The Pre-Hearing Order required Complainant to file by December 6, 1999, "a Complaint alleging in detail the nature of each and every violation as well as the relief sought."

On December 6, 1999, Complainant filed with the undersigned a 21-page document with a 63-page attachment which he requested be considered "as a response to this Court's order . . . and partly as a motion."

On December 10, 1999, The Estes Group, Inc. (herein Estes) filed a Motion to Dismiss the complaint for two reasons: 1) virtually all of the allegations set forth in the complaint are a "rehash of the issues and allegations raised in the hearing of a complaint filed . . . in April 1999;" and 2) Complainant has failed to allege a prima facie case since the only issue raised in the complaint outside the scope of the April 1999 complaint relates to Complainant's unsolicited submission of his resume to Estes after May 17, 1999.[1] Estes contends that it would be unduly prejudicial and wasteful to permit Complainant to use the filing of his instant [second] complaint as a vehicle for re-trying the issues presented and litigated in the hearing of the First Complaint before Judge Avery (herein Hasan I).

Estes further contends that a prima facie case in a failure to hire or rehire context requires a showing that Complainant actually applied for a specific job opening or vacancy and that Complainant has failed to show such an opening. It is further asserted that Complainant has merely transmitted his resume to Estes and no employment ever materialized which fails to meet the requirements of a prima facie case.

On December 13, 1999, Commonwealth Edison Company (herein ComEd) filed a Motion to Dismiss the complaint for failure to set forth any specifics regarding an alleged failure to hire. ComEd also contends that the Complaint constitutes a "rehashing of allegations . . . litigated in the Section 211 case filed in April 1999 . . . (Case No. 1999-ERA-17) . . . ." (Hasan I). ComEd asserts that for Complainant to pursue a failure to hire claim he should be required to "plead that he actually applied for but was denied an identifiable and identified job for which he was qualified. Because he has not done so, his Complaint should be dismissed." Furthermore, to the extent Complainant's Complaint alleges a "blacklisting claim," ComEd argues that Complainant failed to set forth any factual evidence of a violation and offers merely conjecture.

On December 14, 1999, an Order issued requiring Complainant to show cause by December 29, 1999, why the motions of Respondents Estes and ComEd should not be granted.

On December 15, 1999, Complainant filed a "Motion To Disqualify Respondent Estes Group Inc.'s Attorney, Burr E. Anderson and his law firm (Anderson & Thomas),

for Default Judgment and for Sanctions" and a "Motion for Default Judgment and for Sanctions against Respondent Commonwealth Edison Company (ComEd)." Complainant seeks to disqualify Counsel for Estes and requests default judgment and sanctions against Estes for their failure to respond to his requested discovery in the form of Requests for Production of Documents and Interrogatories. Complainant also seeks a default judgment and sanctions against ComEd for failure to respond to his discovery requests notwithstanding ComEd's assertion of objections and privileges.

On December 23, 1999, Estes filed a Motion to Strike Complainant's Motion for Sanctions as specious since his discovery requests were prematurely served on November 6, 1999, one month before his "complaint" was due pursuant to the pre-hearing order.

On December 27, 1999, ComEd filed a response to Complainant's motions. ComEd supplements its Motion to Dismiss in support of its argument that Complainant could presumably file complaints against any nuclear employer contending they had "failed to hire him" by advising that Complainant has filed two additional complaints against ComEd. In response to Complainant's motion for sanctions it is represented that the discovery requests which form the basis of such motions "were little more than a rehashing of the vastly overbroad requests he served in prior litigation (in Case No. 1999-ERA-17), were not tailored to this new case in any meaningful way and were objectionable on numerous grounds."

On December 27, 1999, Complainant filed a response to the Show Cause Order as well as responses to Respondent's motions to dismiss. Complainant has requested that he be allowed to amend his complaint of October 6, 1999, "so that it covers the period from May 18, 1999 to January 19, 2000." However, he provides no specifics to his motion or amendments. Despite an opportunity to enlighten and clarify his Complaint, Complainant presented redundant arguments related to the form of motions, the purported sanctionable misconduct of Respondents' attorneys in failing to provide discovery and the alleged discriminatory conduct of Respondents litigated in the complaint before Judge Avery in Hasan I. He re- urges his Motions for Default Judgment and Sanctions. Although Complainant seemingly acknowledges that the instant case involves alleged discrimination commencing on May 18, 1999, no specifics of any such alleged violations have been forthcoming. Rather, Complainant maintains that Respondents have engaged in a continuing course of conduct which constitutes violations of the ERA. Yet, not one specific act of discriminatory conduct has been described in his response or amendments, except that in August 1999, "others were still working on the safety issues DISCOVERED BY ME . . . ." Notwithstanding his overly general complaint, Complainant insists that Respondents have failed to respond to his discovery, which is also overly broad and general, or provide meaningful discovery and that dismissal would be improper in the absence of discovery. He did not deny that his discovery represents a redundant request for information. He contends, without any factual evidence or

specificity, that Respondents are "systematically excluding" him from consideration for employment.

On December 29, 1999, Complainant filed a response to Respondents' reply to the Motion for Sanctions. Complainant seeks disqualification of Counsel for ComEd from further participation in this matter because he filed a "totally illegal" Motion to Dismiss, which Respondent argued should be a sanction for Complainant's abuse of this process. Complainant thereafter proceeds to accuse Counsel of lying and engaging in "gross professional misconduct" as purportedly supported by alleged actions in a 1986 whistleblower case.

Finally, on January 5, 2000, Estes and ComEd filed replies to Complainant's Response to the Show Cause Order averring that no valid argument was presented against dismissal. They argue that discovery is irrelevant because their motions for dismissal are based on his failure to state a viable claim. Moreover, Estes and ComEd oppose Complainant's "Motion To Amend" to include a period of time after the filing of his October 6, 1999 Complaint.

[Page 5]

On January 7, 2000, ComEd filed, inter alia, a Motion In Limine seeking to "exclude any evidence outside the time frame of May 18 to October 6, 1999, and to exclude any evidence on matters already litigated" in Hasan I. ComEd argues that it did not receive any discovery from Complainant to support his alleged failure to be rehired from May 18 to October 6, 1999, let alone any alleged incidents beyond October 6, 1999. Moreover, ComEd asserts that Complainant has filed three additional complaints against ComEd after October 6, 1999, alleging a failure to rehire and any evidence or testimony of events subsequent to October 6, 1999, would be beyond the scope of the instant case. ComEd also filed a Motion to change the hearing location from Decatur, Alabama to Chicago, Illinois.

For reasons discussed hereinafter, I find and conclude that Complainant has failed to state a viable claim of Respondents' failure to rehire. In sum, he has failed to plead or present any indicia of proof that he applied for a specific job position/vacancy for which he possessed the requisite qualifications and was rejected despite the existence of Respondents' continued search for applicants.

DISCUSSION

A. The Motions to Dismiss

An analysis of the pending motions and responses must begin with the employee protective provision of the ERA. 42 U.S.C. § 5851. The complaint filing provision envisioned by the Act requires the employee to make a prima facie showing that

proscribed behavior by an employer was a contributing factor in the unfavorable personnel action alleged. 42 U.S.C. §§ 5851(b)(3)(A).

General rules of pleadings prescribe such construction to identify and particularize issues to be litigated, determine and establish defenses and narrow and clarify the differences between the parties. See Fed. R. Civ. P. 8. The main object of a pleading is to give the opposing party notice of the claim. Although pleadings filed by a pro se litigant are held to a less stringent standard, they must nonetheless meet minimal pleading requirements. See Salahuddin v. Jones, 992 F.2d 447 (2d Cir. 1993), cert. denied 510 U.S. 902, 114 S.Ct. 278 (1993); Beaudett v. Hampton, 775 F.2d 1274 (4th Cir. 1985), cert. denied 475 U.S. 1088, 106 S.Ct. 1475 (1985). The Federal Rules of Civil Procedure shall apply in any situation not provided for or controlled by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. See 29 C.F.R. § 18.1(b).

[Page 6]

Procedures for the handling of discrimination complaints under federal employee protection statutes provide that an administrative law judge may, at the request of any party, or on his own motion, issue a recommended decision and order dismissing a claim:

> Upon the failure of the Complainant to comply with a lawful order of the administrative law judge.

29 C.F.R. § 24.6(e)(4)(i)(B).

The procedures for handling discrimination complaints under federal employee protection statutes also require that the form of a complaint be in writing and "include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation." 29 C.F.R. § 24.3(c).

The pre-hearing order issued in this matter by the undersigned required Complainant to file a complaint stating "in detail the nature of each and every violation as well as the relief sought." Based on this specificity, Respondents were mandated to file a responsive pleading, an answer, to the complaint allegations. A review of the Complaint filed in this case on December 6, 1999, reveals that all specific factual allegations relate to a time period before and immediately after Complainant's March 26, 1999, termination. (See Complaint, pages 2-21). Complainant alleges that he has "applied for a job (number of times), after my discriminatory/retaliatory lay-off/termination (by ComEd/Estes), to Respondent Estes. I, also applied for a job to Respondent ComEd." It is clear that Complainant's alleged efforts at employment with Respondents after March 26, 1999, through May 17, 1999, was the subject of litigation in Hasan I. Complainant has not alleged, with any specificity, his application for any job vacancies after May 17, 1999. It is undisputed that he sent his resume to Estes on two occasions after May 17, 1999; on August 24, 1999 and September 21, 1999. (Attachment 1 to Complaint, pp. 1, 3) and to

ComEd on November 17, 1999 (Attachment 1 of Complaint, pp. 9-10). His complaint however does not identify any specific job opening on any specific date for which he sought employment, or that he was rejected for such employment.

It is well-settled that in a case involving an alleged discriminatory refusal or failure to hire/re-hire, to establish a prima facie case Complainant must show that (1) he applied for and (2) was qualified for a job (3) for which Respondents were seeking applicants and, (4) despite his qualifications, he was rejected and (5) that after his rejection, the position vacancy remained open and (6) the Respondents continued to seek applicants from persons of Complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The foregoing McDonnell Douglas framework applies as well to determining whether a Complainant in an ERA case has established adverse action in Respondent's failure to hire/re-hire him. See Samodurov v. Niagara Mohawk Power Corp. and General Physics Corporation, Case No. 89-ERA-20 (Sec'y, Decision and Order, Nov. 16, 1993).

In the present matter, Complainant has failed to allege or show that he "applied" for a job vacancy through Estes or ComEd for which he was qualified; that he was not hired for the job; that either another candidate was hired or Respondents continued their search for applicants. Moreover, implicit within any discriminatory allegations is the requirement to also allege or show that Complainant's "protected activity" was known to Respondents and that he was denied a job position or treated differently because of his protected activity. The identical failings exist in Complainant's alleged "blacklisting" rhetoric. In essence, he claims ComEd "shall never permit me to work" or will see that he is "never employed, at least in the nuclear industry." A blacklisting claim should set forth specific allegations of a "blacklist" document containing a list of persons marked out for special avoidance or any other source of communication distributed throughout the nuclear industry intended to preclude employment of complainant. Howard v. Tennessee Valley Authority, Case No. 90-ERA-24 (Sec'y July 3, 1991); Hasan v. Sargent & Lundy, Case No. 96-ERA-27 (ALJ Recommended Dec. and Order, Nov. 4, 1996)(Slip Op., p. 10). Complainant failed to allege any of the foregoing critical elements of his case in his complaint. In his response to the show cause order, he again failed to provide any specificity regarding the alleged discrimination visited upon him by Respondents between May 18, 1999 to October 6, 1999. Instead, he re-pled his case before Judge Avery in Hasan I.

Complainant has failed to allege any discriminatory violations worthy of a formal hearing. He has failed to allege the existence of any jobs or their availability or that he applied or sought any specific job with Respondents. He has failed to allege how and when Respondents allegedly discriminated against him. See Holtzclaw v. United States Environmental Protection Agency, Case No. 95-CAA-7 (ARB, Final Dec. and Order, Feb. 13, 1997)(Slip. Op., p. 4); Acord v. Alyseska Pipeline Service Co., Case No. 95-TSC-4 (ARB, Final Dec. and Order, June 30, 1997)(Slip. Op., p. 6). Although Complainant repeatedly refers to himself as a "pro se litigant," I am not persuaded that he is a novice in these matters. Complainant has filed numerous Section 211 complaints under the ERA in which he has appeared pro se.[2] As argued by Respondents,

Complainant has only alleged that he submitted his resume to Respondents and he remains unemployed. Even if true, the foregoing does not sufficiently state a claim or "case or controversy" warranting a formal hearing. In the absence of the details/specificity necessary to frame a failure to hire/re-hire case, Complainant's complaint has failed to (1) set forth a prima facie case of proscribed behavior; (2) particularize the issues; (3) provide a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations, and (4) state in detail the nature of each and every violation as well as the relief sought. Complainant has not advanced any cogent reason for failing to comply with the necessary requisites in his complaint or response to the show cause order. Consequently, I find and conclude that Complainant has also failed to comply with the undersigned's pre-hearing order. See Billings v. Tennessee Valley Authority, Case No. 91-ERA-12 (ARB, Final Dec. and Order, June 26, 1996); See generally Laratta v. Niagara Mohawk Power Company, Case No. 86-ERA-3 (Sec'y, Final Order of Dismissal, Apr. 12, 1986). In view of his failure to comply and utter failure to allege a viable claim, Respondents' Motion to Dismiss are hereby **GRANTED** for all of the foregoing reasons.

B. Complainant's Motion To Amend

As noted above, notwithstanding his failure to allege specific facts supporting any violation of a failure to rehire or blacklist by Respondents, Complainant failed to present any cogent reasons in his response to the show cause order why his claim should not be dismissed. He, instead, requested that he be allowed to amend his original complaint to cover the period from May 18, 1999 to January 19, 2000, the date of the presently scheduled formal hearing. Yet, he fails once again to allege any specific facts or violations by Respondents which constitute a viable claim. Without specific events or acts of discrimination alleged, Complainant's motion to amend to add an additional time period after the filing of his Section 211 complaint on October 6, 1999, is meritless and is hereby **DENIED**.

C. Continuous Violations

In his response to the show cause order, Complainant argues that "systematically excluding [Complainant] from consideration for employment . . . by its very nature, is a continuing course of conduct and does constitute a continuing violation." However, his contention is not supported by any evidence or specificity. Even continuing violations must be alleged in detail and cannot be based on mere conjecture or speculation. There is no direct, circumstantial or inferential evidence to corroborate Complainant's continuing violation theory or defeat Respondents' motions to dismiss. Accordingly, Complainant's continuous violations contention is **REJECTED.**

D. Motions To Disqualify Counsel/Respondents and Motions for Default Judgment and Sanctions

Unfortunately, Complainant's motions are replete with unnecessary, baseless, reckless, irrelevant, abusive, offensive, slanderous and frivolous claims, language and accusations against Counsel and Respondents. He refers to Counsel as liars, "so-called officers of the court," who have engaged in "gross professional misconduct" [otherwise not specifically supported]. The only conclusion that can be drawn from such personal attacks is that Complainant, who is pro se and arguably not subject to Rule 11 sanctions, seeks to malign the character of Counsel for Respondents in an attempt to persuade the undersigned to discredit anything filed by counsel, without any legal or rational basis therefor. Complainant's accusations are directed at Counsel because they have not provided redundant requests for discovery information arguably received by Complainant in Hasan I.

Complainant has exhibited no grounds for disqualification of Counsel, their respective law firms or either Respondent. Counsel have sought to respond to Complainant's overly broad and general discovery by asserting objections and privileges. I find Complainant's contentions to be specious and his motions are hereby **DENIED**.

E. Discovery

Complainant argues that because Respondents have not provided information pursuant to his discovery requests, it would be improper to dismiss his case. Respondents responded arguing that discovery in the instant case is irrelevant because Complainant has failed to state a viable claim. I find, in the absence of complaint specificity, Complainant's entire case would be based on a "fishing expedition" in search of specifics through discovery.

[Page 8]

Notwithstanding the overly broad, misdirected, unbridled and general discovery requests, Complainant never sought the specific information required to establish a prima facie case of failure or refusal to hire/rehire or blacklisting. A perusal of Complainant's discovery requests discloses that he has not sought any information relating to the existence of any job openings or new hires after May 17, 1999, nor the skills or qualifications required to fulfill such job vacancies.

Since Complainant's complaint pleadings contain no allegations of specific facts that could establish a prima facie case of discrimination after May 17, 1999, through October 6, 1999, there is no viable claim. In the absence of a viable claim, discovery requests are merely a fishing expedition in a search for information which should not be available to Complainant. See generally Naartex Consulting Corporation v. Watt, 722 F.2d 779, 788 (D.C. Cir. 1983); Lehigh Valley Industries, Inc. v. Birenbaum, 527 F.2d 87, 93-95 (2d Cir. 1975)(no abuse of discretion in the denial of discovery in face of bland assertions of

violations); McLaughlin v. McPhail, 707 F.2d 800, 807 (4th Cir. 1983)(finding no prima facie showing . . . the district court properly exercised its discretion in denying discovery). Accordingly, Complainant's argument that it would be improper to dismiss his case in the absence of discovery is without merit under the extant circumstances and is hereby **REJECTED**.[3]

CONCLUSION AND ORDER

In view of the foregoing rulings, I conclude that Respondents' Motions for Change of Venue or Hearing Location as well as ComEd's Motion In Limine are moot. Respondents' Motions to Dismiss are hereby **GRANTED** for reasons discussed hereinabove. Complainant's Motions To Disqualify Counsel/Respondents, and For Default Judgment and Sanctions are hereby **DENIED**.

IT IS HEREBY ORDERED that the formal hearing presently scheduled for January 19, 2000, be and it is hereby **CANCELLED**.

ORDERED this 10th day of January, 2000, at Metairie, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review is timely filed with the Administrative Review Board within ten (10) business days of the date of this Recommended Decision and/or Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

[1] Complainant's April 1999 complaint was the subject of a formal hearing in Case No. 1999-ERA-17 before Administrative Law Judge Richard Avery on November 8-10, 1999, wherein evidence was adduced relating to alleged discriminatory acts through May 17, 1999, including alleged failures to rehire after Complainant's alleged discriminatory termination on March 26, 1999. (Hasan I). (See Transcript of Record, page 25).

[2] See Hasan v. Nuclear Power Services, Inc., Case No. 36-ERA-24 (Sec'y, Final Dec. and Order, June 26, 1991)(alleging a failure to hire based on a negative recommendation from a former employer); Hasan v. System Energy Resources, Inc., Case No. 89-ERA-36 (Sec'y Final Dec. and Order, Sept. 23, 1992)(alleging discrimination by his employer because he made safety complaints); Hasan v. Bechtel Power Corporation, Case No. 93-ERA-22 (ALJ Decision Recommending Dismissal based on settlement agreement, Dec. 8, 1994); Hasan v. Bechtel Corporation, Case No. 93-ERA-40 (ALJ Decision and Order

Approving Settlement, Dec. 9, 1994); Hasan v. Bechtel Corporation, Case No. 94-ERA-21 (Sec'y Final Order Approving Settlement, Mar. 16, 1995); Hasan v. Intergraph Corp., Case No. 96-ERA-17 (ARB, Final Dec. and Order, Aug. 6, 1977)(rejecting Complainant's failure to hire claim); and Hasan v. Sargent & Lundy, Case No. 96-ERA-27 (ALJ Recommended Dec. and Order, Nov. 4, 1996)(alleging blacklisting within the nuclear power industry.)

[3] I am cognizant that a denial of a Motion for Summary Decision may not be appropriate whenever a moving party denies access to information by means of discovery to a party opposing the motion. 29 C.F.R. § 18.40(d). However, in the present case, which does not involve the existence of material issues of fact but rather the presence of a prima facie case, Complainant's discovery requests are clearly not germaine to the issues raised by the general complaint allegations which fail to state a viable claim. Therefore, I find Section 18.40(d) inapplicable to the instant case.